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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

VENUS YAMASAKI, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

ZICAM LLC, and MATRIXX
INITIATIVES, INC.,

Defendants.

CASE NO.:

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff Venus Yamasaki (“Plaintiff”) brings this Class Action Complaint against Defendants Zicam LLC and Matrixx Initiatives, Inc. (collectively, “Defendants” or “Zicam”), individually and on behalf of all others similarly situated, and complains and alleges upon personal knowledge as to himself and his own acts and experience and, as to all other matters, upon information and belief, including investigation conducted by his attorneys:

NATURE OF THE ACTION

1. This is a class action brought by Plaintiff on behalf of himself and all similarly situated consumers who purchased Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Nasal Swabs, Zicam® Nasal

1 Spray, Zicam® Wild Cherry Lozenges, and/or Zicam® Oral Mist™ (collectively, the “Zicam
2 Products” or “Products”) for personal or household use and not for resale.

3 2. Defendants manufacture, advertise, market, label, distribute, and sell the Zicam
4 Products as homeopathic cold remedies, which are supposedly capable of shortening the duration
5 of the common cold. The Zicam Products are categorically labeled as “The Pre-Cold Medicine”
6 and the front of the Products’ packaging and labels uniformly direct consumers to “take at the first
7 sign of a cold.”

9 3. Each of the Zicam Products, with the exception of Zicam® Nasal Swabs and
10 Zicam® Nasal Spray, contains the active ingredients zincum aceticum and zincum gluconicum for
11 the alleged purpose of “reduc[ing] [the] duration and severity of the common cold.”¹

12 4. Defendants misrepresent on the Products’ packaging and labels, in their advertising
13 and marketing, and on their website that each of the Zicam Products has been “clinically proven to
14 shorten colds” (“the Claim”). This Claim is consistently and prominently presented on the front of
15 each Zicam Product’s packaging and label in a bold, all-caps font in order to capture the attention
16 of trusting consumers.

17 5. Defendants fail to disclose to unsuspecting consumers that the Zicam Products have
18 *never* been clinically tested to determine whether they impact the duration of the common cold, and
19 that there is no scientific support for the Claim that the Zicam Products are “clinically proven to
20 shorten colds.” Nor do Defendants disclose that the Claim is based upon a single study performed
21 in 2012 by Dr. Michelle Science, M.D., *et al.*, which did not specifically test the Zicam Products
22 and, in fact, concluded that there is uncertainty regarding the clinical benefit of using zinc to reduce
23 the duration of the common cold (the “Science Study”).² Rather, the Science Study, upon which
24 Defendants rely, analyzed the use of zinc for the treatment of the common cold, in general, and
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28 ¹ <https://www.zicam.com/our-products/cold-shortening/rapid-melts-citrus/> (last visited March 22, 2021).

² <https://www.zicam.com/faqs/zinc-and-colds/> (last visited March 22, 2021).

1 concluded that “[t]he moderate quality of evidence suggested that orally administered zinc reduced
2 the duration of symptoms of the common cold. However, the evidence of benefit was limited to
3 adults, and even in this patient group, uncertainty remained about its clinical benefit.”³

4
5 6. If there are levels of falsity, then Defendants’ misrepresentation regarding the
6 Zicam® Nasal Swabs and Zicam® Nasal Spray is the pinnacle. Neither product has included zinc
7 as an ingredient since Defendants recalled and reformulated both products in response to the Food
8 and Drug Administration’s (“FDA”) June 2009 warning letter, which was prompted by hundreds
9 of consumers having their sense of smell damaged by certain Zicam® products.⁴ Notwithstanding
10 the fact that Zicam® Nasal Swabs and Zicam® Nasal Spray have not contained zinc as an ingredient
11 for several years, Defendants uniformly and falsely label both products as “clinically proven to
12 shorten colds.” As discussed above, this Claim is based upon the Science Study, which exclusively
13 focused on the use of zinc to shorten the duration of the common cold. Given the fact that neither
14 product contains zinc, the Science Study provides absolutely no scientific support for Defendants’
15 Claim in connection with Zicam® Nasal Swabs and Zicam® Nasal Spray.

17 7. Since the Science Study upon which Defendants rely had uncertain results and no
18 testing has been performed regarding the Zicam Products in particular, there is no legitimate basis
19 for Defendants’ Claim that the Products are “clinically proven to shorten colds.” Nevertheless,
20 Defendants consistently and uniformly use this Claim as the cornerstone of their labeling,
21 advertising, and marketing efforts across the entire Zicam Product line.

23 8. In short, in an effort to achieve maximum profits, Defendants have used deceptive
24 labeling and marketing tactics to prey upon consumers desperate to reduce the duration of
25
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28 ³ <https://www.ncbi.nlm.nih.gov/books/NBK99972/> (last visited March 22, 2021).

⁴ <https://wayback.archiveit.org/7993/20170112195553/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2009/ucm166909.htm> (last visited March 22, 2021).

1 thecommon cold through the use of products represented as having been clinically proven to be
2 effective.

3 9. As a direct and proximate result of Defendants' false and misleading advertising
4 claims and marketing tactics, Plaintiff and Class Members, as defined below, purchased
5 Defendants' Zicam Products. Plaintiff and Class Members reasonably relied upon Defendants'
6 representations and were misled to believe that the Zicam Products had been clinically proven to
7 shorten colds. As a result, Plaintiff and Class Members purchased Zicam Products that have *not*
8 been clinically proven to shorten colds and have been injured in fact. Plaintiff and Class Members
9 seek monetary relief in the form of actual damages, injunctive relief, and all further equitable relief
10 available under the applicable law.
11

12 PARTIES

13
14 10. Plaintiff Venus Yamasaki is and was at all times relevant to this complaint a
15 resident of Daly City, San Mateo County, California.

16 11. Defendant Zicam LLC is an Arizona Limited Liability Corporation with its
17 principal place of business located at 8515 E. Anderson Drive, Scottsdale, Arizona 85255. Zicam
18 LLC manufactures, advertises, markets, labels, distributes, and sells the Zicam Products. It is a
19 wholly-owned subsidiary of Defendant Matrixx Initiatives, Inc. At all times relevant to this
20 complaint, Zicam LLC has transacted business in this judicial district and throughout the United
21 States, including in California.
22

23 12. Defendant Matrixx Initiatives, Inc. is a privately-held Delaware corporation with
24 its principal place of business located at 440 Route 22 East, 1 Grande Commons, Suite 130,
25 Bridgewater, New Jersey 08807. Matrixx Initiatives, Inc. manufactures, advertises, markets, labels,
26 distributes, and sells the Zicam Products. It wholly owns Defendant Zicam LLC. At all times
27 relevant to this complaint, Matrixx Initiatives, Inc. has transacted business in this judicial district
28 and throughout the United States, including in California.

JURISDICTION AND VENUE

13. This Court has personal jurisdiction over Defendants in this matter. The acts and omissions giving rise to this action occurred in the state of California, Defendants have been afforded due process because they have, at all times relevant to this matter, individually or through their agents, subsidiaries, officers and/or representatives, operated, conducted, engaged in and carried on a business venture in this state and/or maintained an office or agency in this state, and/or marketed, advertised, distributed and/or sold products, committed a statutory violation with this state related to the allegations made herein, and caused injuries to Plaintiff and putative Class Members, which arose out of the acts and omissions that occurred in the state of California, during the relevant time period, at which time Defendants were engaged in business activities in the state of California.

14. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332 of the Class Action Fairness Act of 2005 because: (1) there are 100 or more putative Class Members, (ii) the aggregate amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (iii) there is minimal diversity because at least one Plaintiff and Defendants are citizens of different states. This Court has supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

15. Under 28 U.S.C. § 1391, venue is proper in the Northern District of California because Plaintiff resides in this District, Defendants conduct business in this District, and both Defendants have intentionally availed themselves of the laws and markets within this District.

INTRADISTRICT ASSIGNMENT

16. Pursuant to Civil Local Rule 3-2(c-d), a substantial part of the events giving rise to the claims herein arose in San Mateo County, California and this action should be assigned to the San Francisco Division or the Oakland Division.

FACTS COMMON TO ALL CLASS MEMBERS

16. The Zicam Products are a line of homeopathic products sold over-the-counter as supposed cold remedies capable of shortening the duration of symptoms of the common cold.

17. Zicam was developed in the mid-1990s, and Defendants began manufacturing, marketing, advertising, distributing and selling the products shortly thereafter.

18. Since the inception of Zicam, Defendants have been the exclusive manufacturers, marketers, advertisers, distributors, and sellers of Zicam-branded products.

19. Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Wild Cherry Lozenges, and Zicam® Oral Mist™ contain the active ingredients zincum aceticum (“zinc acetate”) and zincum gluconicum (“zinc gluconate”).⁵

20. Zicam® Nasal Swabs and Zicam® Nasal Spray do not contain zinc acetate or zinc gluconate. Instead, the active ingredients in these two products are galphimia glauca, luffa operculata, and sabadilla.⁶

21. Unlike traditional medicines, the Zicam Products are not approved by the FDA. In fact, there are no FDA-approved products labeled as “homeopathic.”⁷ Any product labeled as “homeopathic” in the United States is being marketed without FDA evaluation for safety or effectiveness to diagnose, treat, cure, prevent or mitigate any diseases or conditions.⁸

22. The front of the packaging and labels for each of the Zicam Products includes the word “homeopathic.”

⁵ <https://www.zicam.com/our-products/cold-shortening/rapid-melts-citrus/>; <https://www.zicam.com/our-products/cold-shortening/wild-cherry-lozenges/>; <https://www.zicam.com/our-products/cold-shortening/ultra-rapid-melts-orange-cream/>; <https://www.zicam.com/our-products/cold-shortening/oral-mist-arctic-mint/>; and <https://www.zicam.com/our-products/elderberry/rapid-melts-citrus-elderberry/>. (last visited March 22, 2021).

⁶ <https://www.zicam.com/our-products/cold-shortening/nasal-swabs/>; <https://www.zicam.com/our-products/cold-shortening/nasal-spray/> (last visited March 22, 2021).

⁷ <https://www.fda.gov/drugs/information-drug-class/homeopathic-products> (last visited March 22, 2021).

⁸ *Id.*

23. Additionally, the front of the packaging and labels for each of the Zicam Products includes the Claim that the Products are “clinically proven to shorten colds.” The Claim is consistently and prominently presented in a bold, all-caps font in order to capture the attention of trusting consumers. As seen below, the majority of the Zicam Products place the Claim in white text on a blue banner that ensures it pops and catches the eye. The two Products that do not feature this banner treatment (Zicam® Nasal Swabs and Zicam® Nasal Spray) emphasize the Claim by highlighting the words “clinically proven” in yellow and increasing the font size of these two words in comparison to the surrounding words.





Above: Front of packaging for Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Wild Cherry Lozenges, Zicam® Oral Mist™, Zicam® Nasal Swabs, and Zicam® Nasal Spray, respectively, each of which prominently features the Claim.

24. Defendants' website expands on their "cold shortening" representations, claiming that, "[o]ur homeopathic Zicam® Cold Remedy products are clinically proven to shorten colds when taken at the first sign, so you can get back to the fun stuff faster."⁹ Defendants also state on

⁹ <https://www.zicam.com/our-products/cold-shortening/> (last visited March 22, 2021).

1 their website that “Zicam® is clinically proven to shorten colds. Don’t just treat the symptoms of
 2 a cold, shorten your cold with Zicam® Cold Remedy.”¹⁰ These representations are followed by a
 3 tiny asterisk, which references an equally tiny footnote vaguely stating, “For zinc cold remedies
 4 and homeopathic cold products.” At the bottom of the Cold Shortening products page of their
 5 website, Defendants include the following representations:
 6

- 7 • Clinical results have been shown for Zicam® Cold Remedy RapidMelts®, ULTRA
 8 RapidMelts®, ULTRA Crystals, Medicated Fruit Drops, Lozenges, Oral Mist™,
 9 Nasal Spray and Nasal Swabs;
- 10 • These statements are based upon traditional homeopathic practice; and
- 11 • Claims based on traditional homeopathic practice, not accepted medical evidence.
 Not FDA evaluated.¹¹

12 25. The misrepresentations and omissions identified in this complaint are virtually
 13 identical across all of the Zicam Products, and the Claim that forms the basis of this action is the
 14 same for each Product. In other words, the means of deception is the same for all of the Zicam
 15 Products.
 16

17 26. Defendants’ representations are designed to induce consumers to believe that the
 18 Zicam Products have been scientifically evaluated and proven to shorten the duration of the
 19 common cold. This representation is material to consumers and the primary factor motivating
 20 consumer purchases of the Zicam Products.
 21

22 27. Defendants’ representations on their packaging and website convey to reasonable
 23 consumers and reasonable consumers would believe that the state of the science regarding the
 24 Zicam Products and their ingredients have reached a level of scientific consensus such that
 25 Defendants’ claims that the Products are “clinically proven to shorten colds” is an established truth
 26 and statement of fact.
 27

28 ¹⁰ *Id.*

¹¹ *Id.* Notably, Zicam ULTRA Crystals and Medicated Fruit Drops are not at issue in this action.

1 28. It is reasonable for consumers to rely upon Defendants' representations concerning
2 the Zicam Products when deciding to purchase the Products. The one and only reason that
3 consumers purchase the Zicam Products is the desire to receive the advertised benefit of shortening
4 the duration of a cold.

5
6 29. Defendants' representations concerning the Zicam Products being "clinically
7 proven to shorten colds" were developed with the intent to generate sales of the Products and
8 capture a substantial percentage of the cold remedy market.

9 30. Defendants have made uniform, express, and implied representations concerning
10 the Zicam Products, including that each Product has been "clinically proven to shorten colds." This
11 representation pervades Defendants' labeling and marketing of the Zicam Products.

12
13 31. Unfortunately for consumers, there is no scientific evidence validating Defendants'
14 bold Claim that the Zicam Products have been "clinically proven to shorten colds." What
15 Defendants fail to disclose to unsuspecting consumers on the Product packaging, their websites,
16 and marketing and advertising is that the Zicam Products have *never* been clinically tested to
17 determine whether or not they have any impact on the duration of the common cold. Since the
18 Zicam Products have never been clinically studied, nothing has been proven regarding their ability
19 to shorten colds.

20
21 32. Defendants also fail to disclose that the single zinc study they rely upon provides
22 no scientific support for the Claim that the Zicam Products are "clinically proven to shorten colds."
23 This Claim is solely based upon the Science Study performed in 2012, which did not specifically
24 test the Zicam Products and, in fact, concluded that there is uncertainty regarding the clinical benefit
25 of using zinc to reduce the duration of the common cold (the "Science Study").¹² Rather, the
26 Science Study, upon which Defendants rely, analyzed the use of zinc for the treatment of the
27

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¹² <https://www.zicam.com/faqs/zinc-and-colds/> (last visited March 22, 2021).

1 common cold, in general, and concluded that “[t]he moderate quality of evidence suggested that
2 orally administered zinc reduced the duration of symptoms of the common cold. However, the
3 evidence of benefit was limited to adults, and even in this patient group, uncertainty remained about
4 its clinical benefit.”¹³

5
6 33. In fact, recent studies have indicated that the use of over-the-counter cold remedies
7 containing zinc, including zinc acetate lozenges, do *not* shorten the duration of the common cold.¹⁴
8 In 2019, a randomized, double-blinded, placebo-controlled trial conducted in Finland determined
9 that “[t]here was no difference in the recovery rate between zinc and placebo participants during
10 the 10-day follow-up.”¹⁵ And while the “recovery rate for the two groups was similar during the
11 5-day intervention,” for 2 days after the end of zinc and placebo use, “the zinc participants
12 recovered significantly *slower* compared with the placebo participants...”¹⁶ The study concluded
13 that “[a] commercially available zinc acetate lozenge was not effective in treating the common cold
14 when instructed to be used for 5 days after the first symptoms.”¹⁷

15
16 34. Defendants’ use of the Claim in connection with the Zicam® Nasal Swabs and
17 Zicam® Nasal Spray is particularly egregious and offensive. Both products were reformulated so
18 as to not include zinc as an ingredient after the FDA issued a warning letter in June 2009 regarding
19 these products due to hundreds of consumers having their sense of smell damaged by the products.¹⁸
20 Yet, Defendants have continued to market, advertise, and label Zicam® Nasal Swabs and Zicam®
21 Nasal Spray as “clinically proven to shorten colds” despite the fact that this Claim is based on a
22 study of zinc, which has not been an ingredient in either product for several years. It is a false and
23 deceptive misrepresentation to claim that either product has been clinically proven to shorten colds
24

25
26 ¹³ <https://www.ncbi.nlm.nih.gov/books/NBK99972/> (last visited March 22, 2021).

¹⁴ <https://bmjopen.bmj.com/content/10/1/e031662> (last visited March 22, 2021).

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.*

¹⁸ <https://wayback.archiveit.org/7993/20170112195553/http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2009/ucm166909.htm> (last visited March 22, 2021).

1 when that Claim is exclusively premised upon the study of an active ingredient which neither
2 product includes.

3 35. Further, since the Science Study upon which Defendants rely had uncertain results
4 regarding the ability of zinc to shorten the duration of the common cold, and no testing has been
5 performed specifically regarding the Zicam Products in particular, there is no legitimate basis for
6 Defendants' Claim that the Products are "clinically proven to shorten colds." Nevertheless,
7 Defendants consistently and uniformly use this Claim as the cornerstone of their advertising,
8 marketing, and labeling efforts across the entire Zicam Product line. Defendants' continued use of
9 the Claim is fraudulent or, at a minimum, disturbingly misleading.
10

11 **PLAINTIFF'S FACTUAL ALLEGATIONS**

12 36. After reviewing information about Zicam® Nasal Spray online and in-store via the
13 Products' packaging and labels regarding it supposedly being "clinically proven to shorten colds,"
14 Plaintiff purchased Zicam® Nasal Spray at a drugstore in Daly City, California in or around 2019,
15 and began using the Product.
16

17 37. As a result of Defendants' material misrepresentations and omissions, Plaintiff
18 purchased Zicam® Nasal Spray because she reasonably believed that it had been "clinically proven
19 to shorten colds," as marketed, advertised, packaged, and labeled. Plaintiff would not have
20 purchased Zicam® Nasal Spray, or would have paid less for it, had she known that the Zicam
21 Products have never been clinically tested to determine whether they impact the duration of the
22 common cold, and that there is no scientific support for the Claim that the Zicam Products are
23 "clinically proven to shorten colds."
24

25 38. Plaintiff had not previously purchased or used any Zicam Products.

26 39. Plaintiff followed the instructions on the Zicam Product packaging, as directed by
27 Defendants.
28

TOLLING AND ESTOPPEL OF STATUTE OF LIMITATIONS

40. Defendants had actual knowledge for years that the Zicam Products have never been clinically tested to determine whether they impact the duration of the common cold, and that there is no scientific support for their Claim that the Zicam Products are “clinically proven to shorten colds.”

41. Although Defendants were aware that the Claim is a false and deceptive misrepresentation, they took no steps to disclose the truth to Plaintiff or Class Members.

42. At least by 2009, Defendants knew that the reformulated Zicam® Nasal Swabs and Zicam® Nasal Spray did not contain zinc and, therefore, are not supported by any study or claim regarding the potential for zinc to shorten the duration of the common cold.

43. At least by 2012, Defendants knew that the Science Study does not support the Claim that the Zicam Products are “clinically proven to shorten colds.”

44. At least by 2012, Defendants knew that the Zicam Products have never been clinically tested to determine whether they impact the duration of the common cold.

45. Despite its knowledge, Defendants have fraudulently concealed the fact that the Claim is a misrepresentation and that Zicam Products have not been clinically proven to shorten colds.

46. Defendants made affirmative misrepresentations to consumers during the sales of the Zicam Products.

47. Defendants concealed material facts that would have been important to Plaintiff and Class Members in deciding whether to purchase the Zicam Products. Defendants’ concealment was knowing, and they intended to deceive Plaintiff and Class Members to rely upon it. Accordingly, Plaintiff and Class Members reasonably relied upon Defendants’ concealment of these material facts and suffered injury as a proximate result of that justifiable reliance.

1 48. The falsity of the Claim was not reasonably detectible to Plaintiff and Class
2 Members.

3 49. Defendants actively and intentionally concealed the falsity of the Claim and failed
4 to inform Plaintiff or Class Members of its falsity at all times. Accordingly, Plaintiff and Class
5 Members' lack of awareness was not attributable to a lack of diligence on their part.
6

7 50. Defendants' statements, words, and acts were made for the purpose of suppressing
8 the truth that the Zicam Products have never been clinically tested to determine whether they impact
9 the duration of the common cold, and that there is no scientific support for the Claim that the Zicam
10 Products are "clinically proven to shorten colds."

11 51. Defendants concealed the falsity of the Claim for the purpose of delaying Plaintiff
12 and Class Members from filing a complaint on their causes of action.
13

14 52. As a result of Defendants' active concealment of the truth and/or failure to inform
15 Plaintiff and Class Members of the falsity of the Claim, any and all applicable statutes of limitations
16 otherwise applicable to the allegations herein have been tolled. Furthermore, Defendants are
17 estopped from relying on any statutes of limitations in light of its active concealment of the falsity
18 of the Claim.
19

20 53. Further, the causes of action alleged herein did not occur until Plaintiff and Class
21 Members discovered that the Zicam Products have never been clinically tested to determine
22 whether they impact the duration of the common cold, and that there is no scientific support for the
23 Claim that the Zicam Products are "clinically proven to shorten colds." Plaintiff and Class
24 Members had no realistic ability to determine the falsity of the Claim. In either event, Plaintiff and
25 Class Members were hampered in their ability to discover their causes of action because of
26 Defendants' active concealment of the fact that the Claim is unsubstantiated by any scientific
27 evidence.
28

FED. R. CIV. P. 9(b) ALLEGATIONS
(Affirmative and By Omission)

54. Although Defendants are in the best position to know what content they placed on the Product packaging and labels, in advertising and marketing materials, and on their website(s) during the relevant timeframe, to the extent necessary, Plaintiff satisfies the requirements of Rule 9(b) by alleging the following facts with particularity:

55. **WHO:** Defendants made material misrepresentations and/or omissions of fact through their Product packaging and labeling, advertising and marketing, website representations, and warranties, all of which include the Claim that the Zicam Products are “clinically proven to shorten colds.”

56. **WHAT:** Defendants’ conduct here was, and continues to be, fraudulent because it omitted and concealed that the Zicam Products have never been clinically tested to determine whether they impact the duration of the common cold, and that there is no scientific support for the Claim that the Zicam Products are “clinically proven to shorten colds.” Further, Defendants’ conduct deceived Plaintiff and Class Members into believing that the Zicam Products have actually been “clinically proven to shorten colds.” Defendants knew or should have known that this information is material to reasonable consumers, including Plaintiff and Class Members in making their purchasing decisions, yet they omit any disclosure of the fact that the Zicam Products have never been clinically tested to determine whether they impact the duration of the common cold, and that there is no scientific support for the Claim that the Zicam Products are “clinically proven to shorten colds.”

57. **WHEN:** The material misrepresentations and/or omissions detailed herein were made prior to and available at the time Plaintiff and Class Members surveyed the field of available cold remedies in order to gather information that would aid them in selecting the best product, prior

1 to and at the time Plaintiff and Class Members purchased the Zicam Products, and continuously
2 throughout the applicable class period.

3 58. **WHERE:** Defendants' material misrepresentations and/or omissions were made
4 on the Product packaging and labels, in advertising and marketing materials, and on their
5 website(s).
6

7 59. **HOW:** Defendants made misrepresentations and/or failed to disclose material facts
8 regarding the fact that the Zicam Products have never been clinically tested to determine whether
9 they impact the duration of the common cold, and that there is no scientific support for the Claim
10 that the Zicam Products are "clinically proven to shorten colds" in written form, electronic form,
11 or conventional hardcopy form.
12

13 60. **WHY:** Defendants made the material misrepresentations and/or omissions detailed
14 herein for the express purpose of inducing Plaintiff, Class Members, and all reasonable consumers
15 to purchase and/or pay for the Zicam Products, the effect of which was that Defendants profited by
16 selling the Zicam Products to many hundreds of thousands of consumers.

17 61. **INJURY:** Plaintiff and Class Members purchased or paid more for the Zicam
18 Products when they otherwise would not have absent Defendants' misrepresentations and/or
19 omissions. Further, the Zicam Products continue to be sold via material misrepresentations and/or
20 omissions on the Product packaging and labels, in advertising and marketing materials, and on
21 Defendants' website(s), causing additional consumers to purchase the Products for more than they
22 would be willing to pay if they knew that the Zicam Products have never been clinically tested to
23 determine whether they impact the duration of the common cold, and that there is no scientific
24 support for the Claim that the Zicam Products are "clinically proven to shorten colds."
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CLASS ACTION ALLEGATIONS

62. Pursuant to Federal Rule of Civil Procedure 23(a), (b)(2) and/or (b)(3). Plaintiff brings this action on behalf of a proposed National Class, Multi-State Class, and California Subclass, defined as follows:

National Class

During the fullest period allowed by law, all persons residing in the United States who purchased Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Nasal Swabs, Zicam® Nasal Spray, Zicam® Wild Cherry Lozenges, and/or Zicam® Oral Mist™.

Multi-State Class

During the fullest period allowed by law, all persons residing in the states listed below who purchased Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Nasal Swabs, Zicam® Nasal Spray, Zicam® Wild Cherry Lozenges, and/or Zicam® Oral Mist™.

California Subclass

During the fullest period allowed by law, all persons residing in the state of California who purchased Zicam® Original RapidMelts®, Zicam® ULTRA RapidMelts®, Zicam® Elderberry Citrus RapidMelts®, Zicam® Nasal Swabs, Zicam® Nasal Spray, Zicam® Wild Cherry Lozenges, and/or Zicam® Oral Mist™.

63. Excluded from the Classes are (a) any person who purchased the Zicam Products for resale and not for personal or household use, (b) any person who signed a release of any Defendant in exchange for consideration, (c) any officers, directors or employees, or immediate family members of the officers, directors or employees, of any Defendant or any entity in which a Defendant has a controlling interest, (d) any legal counsel or employee of legal counsel for any Defendant, and (e) the presiding Judge in this lawsuit, as well as the Judge's staff and their immediate family members.

64. Plaintiff reserves the right to amend the definitions of the Classes if discovery or further investigation reveals that the Subclass should be expanded or otherwise modified.

1 65. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** Class Members are so
2 numerous and geographically dispersed that joinder of all Class Members is impracticable. While
3 the exact number of Class Members remains unknown at this time, upon information and belief,
4 there are thousands, if not hundreds of thousands, of putative Class Members. Class Members may
5 be notified of the pendency of this action by mail and/or electronic mail, which can be supplemented
6 if deemed necessary or appropriate by the Court with published notice.
7

8 66. **Predominance of Common Questions of Law and Fact – Federal Rule of Civil**
9 **Procedure 23(a)(2) and 23(b)(3).** Common questions of law and fact exist as to all Class Members
10 and predominate over any questions affecting only individual Class Members. These common legal
11 and factual questions include, but are limited to, the following:
12

- 13 a. Whether the Zicam Products have been clinically tested;
- 14 b. Whether any clinical test has proven that the Zicam Products shorten colds;
- 15 c. Whether Defendants violated the Magnuson-Moss Act, 15 U.S.C. §§ 2301, *et seq.*;
- 16 d. Whether Defendants' packaging, labeling, marketing, advertising, and/or other
17 promotional materials for the Zicam Products are deceptive, unfair, or misleading;
- 18 e. Whether Defendants' acts, omissions, or misrepresentations of material facts
19 violate certain state deceptive practice acts, including those of California;
- 20 f. Whether Defendants breached express warranties in connection with the Products;
- 21 g. Whether Defendants breached implied warranties in connection with the Products;
- 22 h. Whether Defendants' acts, omissions or misrepresentations of material facts
23 constitute fraud;
- 24
- 25
- 26
- 27
- 28

- i. Whether Defendants' acts, omissions or misrepresentations of material facts constitute a breach of contract or common law warranty;
- j. Whether Plaintiff and putative Class Members have suffered an ascertainable loss of monies or property or other value as a result of Defendants' acts, omissions or misrepresentations of material facts;
- k. Whether Defendants were unjustly enriched at the expense of Plaintiff and putative Class Members in connection with the Products;
- l. Whether Plaintiffs and putative Class Members are entitled to monetary damages and, if so, the nature of such relief; and
- m. Whether Plaintiff and putative Class Members are entitled to equitable, declaratory or injunctive relief and, if so, the nature of such relief.

67. Pursuant to Rule 23(b)(2), Defendants have acted or refused to act on grounds generally applicable to the putative Class, thereby making final injunctive or corresponding declaratory relief appropriate with respect to the putative Class as a whole. In particular, Defendants have manufactured, packaged, labeled, marketed, advertised, distributed and sold the Zicam Products, which are deceptively misrepresented as "clinically proven to shorten colds."

68. **Typicality – Federal Rule of Civil Procedure 23(a)(3).** Plaintiff's claims are typical of the claims of the Members of the Class, as each putative Class Member was subject to the same uniform deceptive misrepresentation regarding the Claim that the Zicam Products have been "clinically proven to shorten colds." Plaintiff shares the aforementioned facts and legal claims or questions with putative Class Members, and Plaintiff and all putative Class Members have been similarly affected by Defendants' common course of conduct alleged herein. Plaintiff and all putative Class Members sustained monetary and economic injuries including, but not limited to, ascertainable loss arising out of Defendants' deceptive misrepresentations regarding the false Claim that the Zicam Products have been "clinically proven to shorten colds," as alleged herein.

1 69. **Adequacy – Federal Rule of Civil Procedure 23(a)(4).** Plaintiff will fairly and
2 adequately represent and protect the interests of the putative Class.

3
4 70. Plaintiff has retained counsel with substantial experience in handling complex class
5 action litigation, including complex questions that arise in this type of consumer protection
6 litigation. Further, Plaintiff and his counsel are committed to the vigorous prosecution of this
7 action. Plaintiff does not have any conflicts of interest or interests adverse to those of putative Class
8 Members.

9
10 71. **Insufficiency of Separate Actions – Federal Rule of Civil Procedure 23(b)(1).**
11 Absent a class action, Class Members will continue to suffer the harm described herein, for which
12 they would have no remedy. Even if separate actions could be brought by individual consumers,
13 the resulting multiplicity of lawsuits would cause undue burden and expense for both the Court and
14 the litigants, as well as create a risk of inconsistent rulings and adjudications that might be
15 dispositive of the interests of similarly situated consumers, substantially impeding their ability to
16 protect their interests, while establishing incompatible standards of conduct for Defendants.
17 Accordingly, the proposed Class satisfies the requirements of Fed. R. Civ. P. 23(b)(1).
18

19
20 72. **Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).**
21 Defendants have acted or refused to act on grounds generally applicable to Plaintiff and all
22 Members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as
23 described below, with respect to Class Members as a whole.
24

25 73. **Superiority – Federal Rule of Civil Procedure 23(b)(3).** A class action is
26 superior to any other available methods for the fair and efficient adjudication of the present
27 controversy for at least the following reasons:
28

- a. The damages suffered by each individual putative Class Member do not justify the burden and expense of individual prosecution of the complex and extensive litigation necessitated by Defendants' conduct;
- b. Even if individual Class Members had the resources to pursue individual litigation, it would be unduly burdensome to the courts in which the individual litigation would proceed;
- c. The claims presented in this case predominate over any questions of law or fact affecting individual Class Members;
- d. Individual joinder of all putative Class Members is impracticable;
- e. Absent a Class, Plaintiff and putative Class Members will continue to suffer harm as a result of Defendants' unlawful conduct; and
- f. This action presents no difficulty that would impede its management by the Court as a class action, which is the best available means by which Plaintiff and putative Class Members can seek redress for the harm caused by Defendants.

74. In the alternative, the Class may be certified for the following reasons:

- a. The prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudication with respect to individual Class Members, which would establish incompatible standards of conduct for Defendants;
- b. Adjudications of individual Class Members' claims against Defendants would, as a practical matter, be dispositive of the interests of other putative Class Members who are not parties to the adjudication and may substantially impair or impede the ability of other putative Class Members to protect their interests; and
- c. Defendants have acted or refused to act on grounds generally applicable to the putative Class, thereby making appropriate final and injunctive relief with respect to the putative Class as a whole.

COUNT I

**Violation of California Unfair Competition Law (“UCL”)
Cal. Bus. & Prof. Code §§ 17200, *et seq.*
(On behalf of Plaintiff individually and on behalf of the California Subclass)**

75. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully set forth herein.

76. Plaintiff brings this claim individually and on behalf of all similarly situated California Subclass Members.

77. Plaintiff, California Subclass Members, and Defendants are “persons” within the meaning of the UCL. Cal. Bus. & Prof. Code § 17201.

78. Defendants are subject to California’s UCL, Cal Bus. Prof. Code §§ 17200, *et seq.* The UCL provides, in pertinent part: “Unfair competition shall mean and include unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising”

79. Defendants’ business practices, described above, violated the “unlawful” prong of the UCL. Because Defendants’ representations about the Zicam Products were false and misleading, Defendants have committed unlawful business practices by violating California’s Sherman Food, Drug and Cosmetic Law. Cal. Health & Safety Code §§ 109875, *et seq.*, and the Food Drug and Cosmetic Act, 21 U.S.C. §§ 301, *et seq.*

80. Defendants violated the “unfair” prong of the UCL by making the representations (which also constitute advertising within the meaning of § 17200) and omissions of material facts regarding the Zicam Products on the packaging and labels and on their website, as set forth above. There is no societal benefit from false advertising—only harm.

81. Plaintiff and California Subclass Members paid for valueless Products that are not capable of conferring the benefits promised. While Plaintiff and California Subclass Members were harmed, Defendants were unjustly enriched by their false representations and omissions. As a result, Defendants’ conduct is “unfair,” as it offended an established public policy. Defendants

1 engaged in immoral, unethical, oppressive, and unscrupulous activities that are substantially
2 injurious to consumers.

3 82. Further, Plaintiff alleges violations of consumer protection, unfair competition, and
4 truth in advertising laws in California and other states, resulting in harm to consumers. Defendants'
5 acts and omissions violate and offend the public policy against engaging in false and misleading
6 advertising, unfair competition, and deceptive conduct towards consumers. This conduct
7 constitutes violations of the unfair prong of the Business & Professions Code §§ 17200, *et seq.*

9 83. Defendants violated the fraudulent prong of the UCL by, among other things,
10 making the false representations and omissions of material facts regarding the Zicam Products in
11 their uniform advertising, including the packaging and labeling, as set forth more fully herein. In
12 fact, the Zicam Products are not "clinically proven to shorten colds," as falsely claimed and
13 promised by Defendants.

15 84. Defendants' actions, claims, omissions, and misleading statements, as more fully
16 set forth above, were false, misleading, and/or likely to deceive the consuming public within the
17 meaning of Business & Professions Code §§ 17200, *et seq.*

18 85. Plaintiff and California Subclass Members have, in fact, been deceived as a result
19 of their reliance on Defendants' material misrepresentations and omissions, which are described
20 above. Plaintiff and the California Subclass acted reasonably when they purchased Zicam Products
21 based on their belief that Defendants' representations were true and lawful.

23 86. Plaintiff and California Subclass Members have suffered injury in fact and lost
24 money as a result of their purchases of Defendants' Zicam Products and Defendants' unlawful,
25 unfair, and fraudulent practices.

26 87. Defendants knew, or should have known, that they have no scientific evidence for
27 their claims of clinical proof as set forth above. Defendants further knew, or should have known,
28 that their material misrepresentations and omissions would be likely to deceive and harm the

1 consuming public and result in consumers making payments to Defendants for Zicam Products,
2 which are valueless and not “clinically proven to shorten colds.”

3 88. As a result of their deception, Defendants were unjustly enriched by receiving
4 payments from Plaintiff and the California Subclass for Zicam Products which cannot perform as
5 advertised and when there is no scientific or clinical evidence to support Defendants’ claims of
6 being “clinically proven.”
7

8 89. Unless restrained and enjoined, Defendants will continue to engage in the unlawful,
9 unfair, and fraudulent conduct described herein. Accordingly, injunctive relief is appropriate.
10 Plaintiff, individually and on behalf of all others similarly situated, and on behalf of the general
11 public, seeks restitution from Defendants of all money obtained from Plaintiff and California
12 Subclass Members collected as a result of Defendants’ unfair competition, an injunction prohibiting
13 Defendants from continuing and further engaging in their unlawful, unfair, and fraudulent conduct,
14 requiring corrective advertising, and awarding all other relief this Court deems appropriate.
15

16 **COUNT II**

17 **Violation of the California Consumers Legal Remedies Act (“CLRA”)**

18 **Cal. Civ. Code §§ 1750, *et seq.***

19 **(On behalf of Plaintiff individually and on behalf of the California Subclass)**

20 90. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully
21 set forth herein.

22 91. Plaintiff brings this claim individually and on behalf of all similarly situated
23 California Subclass Members.

24 92. Plaintiff and California Subclass Members are consumers who purchased Zicam
25 Products for personal, family, or household purposes. Plaintiff and the California Subclass have
26 been at all relevant times “consumers” within the meaning of the CLRA, Cal. Civ. Code § 1761(a),
27 (c), and (d).
28

1 93. Defendants are “persons” and Zicam Products are “goods” within the meaning of
2 the CLRA, Cal. Civ. Code § 1761(a), (c), and (d).

3 94. Defendants’ sale and advertisement of Zicam Products constitute “transactions”
4 within the meaning of the CLRA, Cal. Civ. Code § 1761(e).

5 95. The CLRA declares as unlawful the following unfair methods of competition and
6 unfair or deceptive acts or practices when undertaken by any person in a transaction intended to
7 result, or which results in the sale of goods to any consumer:

8 a. “Representing that goods . . . have . . . approval, characteristics, . . . uses [and]

9 benefits . . . which [they do] not have . . .” Cal. Civ. Code § 1770(a)(5).

10 b. “Representing that goods . . . are of a particular standard, quality or grade . . . if
11 they are of another.” Id. (a)(7).

12 c. “Advertising goods . . . with intent not to sell them as advertised.” Id. (a)(9).

13 d. “Representing that [goods] have been supplied in accordance with a previous
14 representation when [they have] not.” Id. (a)(16).

15 96. Defendants violated and continue to violate the CLRA by engaging in the practices
16 prohibited by Cal. Civ. Code § 1770(a)(5), (7), (9), and (16), which were intended to result in, and
17 did result in, the sale of Zicam Products.

18 97. Defendants’ foregoing acts and practices, including their deceptive and fraudulent
19 misrepresentations and omissions in the conduct of trade or commerce, were directed at consumers,
20 including Plaintiff and California Subclass Members.

21 98. Defendants’ violations of the CLRA proximately caused injury in fact to Plaintiff
22 and the California Subclass.

23 99. Plaintiff and California Subclass Members purchased Defendants’ Zicam Products
24 on the belief that they would receive the advertised benefit of shortening the duration of the
25
26
27
28

1 common cold. Indeed, no consumer would purchase Zicam Products unless he or she believed it
2 was capable of providing the advertised benefit of shortening the duration of the common cold.

3 100. The Zicam Products, however, are worthless and cannot provide the advertised
4 benefit. Because the Zicam Products lack any value, Plaintiff and each California Subclass Member
5 was injured by the mere fact of their purchase.
6

7 101. Pursuant to Cal. Civ. Code § 1782(d), Plaintiff, individually and on behalf of the
8 California Subclass Members, seeks a Court order enjoining the above-described wrongful acts and
9 practices of Defendants.

10 102. Pursuant to Cal. Civ. Code 1782(a), on April 8, 2020, Plaintiff provided written
11 notice to Defendants demanding corrective actions. Plaintiff will amend her complaint to add claims
12 for monetary damages if Defendants fail to take the corrective actions.
13

14 103. Pursuant to § 1780(d) of the Act, attached hereto as Exhibit A is the affidavit
15 showing that this action has been commenced in the proper forum.

16 **COUNT III**

17 **Violation of the California False Advertising Law (“FAL”)**

18 **Cal. Bus. & Prof. Code §§ 17500, *et seq.***

19 **(On behalf of Plaintiff individually and on behalf of the California Subclass)**

20 104. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully
21 set forth herein.

22 105. Plaintiff brings this claim individually and on behalf of all similarly situated
23 California Subclass Members.

24 106. The FAL, in relevant party, states that “[i]t is unlawful for ... any corporation ...
25 with intent ... to dispose of ... personal property ... to induce the public to enter into any obligation
26 relating thereto, to make or disseminate or cause to be made or disseminated ... from this state
27 before the public in any state, in any newspaper, or other publication, or any advertising device, or
28 by public outcry or proclamation, or in any other manner or means whatever, including over the

Internet, any statement ... which is untrue or misleading, and which is known or which by the exercise of reasonable care should be known, to be untrue or misleading[.]” Cal. Bus. & Prof. Code § 17500.

107. The required intent is the intent to dispose of property, not the intent to mislead the public in the disposition of such property.

108. Defendants violated the FAL by making the untrue or misleading representations described above, including that Zicam Products have been “clinically proven to shorten colds” when, in reality, there is no scientific and clinical proof of the Zicam Products’ advertised benefits.

109. As a direct and proximate result of Defendants’ untrue and misleading advertising, Plaintiff and California Subclass Members have suffered injury in fact and have lost money.

110. Accordingly, Plaintiff requests that the Court order Defendants to restore the money that Defendants have received from Plaintiff and California Subclass Members, and that the Court enjoin Defendants from continuing their unlawful practices, and engage in corrective advertising.

COUNT IV

Breach of Express Warranty

(On behalf of Plaintiff individually and on behalf of the Classes)

111. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully set forth herein.

112. Plaintiff brings this claim individually and on behalf of all similarly situated Class Members.

113. Plaintiff and Class Members purchased the Zicam Products through retailers such as Walgreens, CVS, Duane Reed, Target, and Walmart, among others.

114. Defendants are and were at all relevant times sellers under Cal. Comm. Code § 2313.

1 115. Defendants, as the designers, manufacturers, packagers, labelers, marketers,
2 distributors, and/or sellers expressly warranted that the Zicam Products were fit for their intended
3 purpose by expressly warranting that the Products were “clinically proven to shorten colds.”
4

5 116. Defendants made the foregoing express representation and warranty to all
6 consumers, which became the basis of the bargain between Plaintiff, Class Members, and
7 Defendants.

8 117. In fact, the Zicam Products are not fit for such purpose because the express warranty
9 is a false, deceptive, and misleading misrepresentation.

10 118. Defendants breach their warranty and/or contract obligations by placing the Zicam
11 Products into the stream of commerce and selling them to consumers, when the Products have never
12 been clinically tested to determine whether they impact the duration of the common cold, and there
13 is no scientific support for the Claim that the Zicam Products are “clinically proven to shorten
14 colds.” The fact that the Zicam Products have not actually been clinically tested in this capacity
15 and that there is no scientific evidence supporting Defendants’ Claim renders the Products unfit for
16 their intended use and purpose, and substantially and/or completely impairs the use and value of
17 the Products.
18

19 119. The warranty that the Zicam Products were “clinically proven to shorten colds” was
20 false when the Products left Defendants’ possession or control and were sold to Plaintiff and Class
21 Members. The fact that the Products have never been clinically tested to determine whether they
22 impact the duration of the common cold, and that there is no scientific support for the Claim was
23 not discoverable by Plaintiff and Class Members at the time of their purchase of the Zicam Products.
24

25 120. Defendants were provided reasonable notice of the aforementioned breaches of the
26 above-described warranties via notice letters served upon and accepted by Defendants’ counsel on
27 April 8, 2021.
28

121. Plaintiff and Class Members were injured as a direct and proximate result of Defendants' breach because they would not have purchased the Zicam Products if they had known the truth about the Products.

COUNT V

**Breach of Contract/Common Law Warranty
(On behalf of Plaintiff individually and on behalf of the Classes)**

122. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully set forth herein.

123. Plaintiff brings this claim individually and on behalf of all similarly situated Class Members.

124. To the extent Defendants' commitment is deemed not to be a warranty under Cal. Comm. Code § 2313, Plaintiff pleads in the alternative under common law warranty and contract law.

125. Plaintiff and Class Members purchased the Zicam Products through retailers such as Walgreens, CVS, Duane Reed, Target, and Walmart, among others.

126. Defendants expressly warranted that the Products were fit for their intended purpose in that the Products were "clinically proven to shorten colds."

127. Defendants made the foregoing express representations and warranties to all consumers, which became the basis of the bargain between Plaintiff, Class Members, and Defendants.

128. Defendants breached their warranty and/or contract obligations by placing the Zicam Products into the stream of commerce and selling them to consumers, when the Products have never been clinically tested to determine whether they impact the duration of the common cold, and there is no scientific support for the Claim that the Zicam Products are "clinically proven to shorten colds." The fact that the Zicam Products have not actually been clinically tested in this capacity and that there is no scientific evidence supporting Defendants' Claim renders the Products

1 unfit for their intended use and purpose, and substantially and/or completely impairs the use and
2 value of the Products.

3 129. The warranty that the Zicam Products were “clinically proven to shorten colds” was
4 false when the Products left Defendants’ possession or control and were sold to Plaintiff and Class
5 Members. The fact that the Products have never been clinically tested to determine whether they
6 impact the duration of the common cold, and that there is no scientific support for the Claim was
7 not discoverable by Plaintiff and Class Members at the time of their purchase of the Zicam Products.
8

9 130. As a direct and proximate cause of Defendants’ breach of contract, Plaintiff and
10 Class Members were harmed because they would not have purchased the Zicam Products if they
11 had known the truth about the Products.
12

13 **COUNT VI**
14 **Breach of Implied Warranty of Merchantability**
(On behalf of Plaintiff individually and on behalf of the Classes)

15 131. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully
16 set forth herein.

17 132. Plaintiff brings this claim individually and on behalf of all similarly situated Class
18 Members.
19

20 133. Defendants, as the designers, manufacturers, packagers, labelers, marketers,
21 distributors, and/or sellers of the Zicam Products, impliedly warranted that the Products were
22 “clinically proven to shorten colds.”

23 134. Defendants, through their acts and omissions set forth herein, in their sale,
24 marketing, and promotion of the Zicam Products, made implied representations to Plaintiff and
25 Class Members that their Products had been clinically tested and proven to shorten colds when, in
26 fact, the Products have never been clinically tested to determine whether they impact the duration
27 of the common cold, and there is no scientific support for this Claim.
28

1 142. Defendants' false and deceptive representations and material omissions to
2 consumers and the public, including Plaintiff, constituted unfair and deceptive acts and practices in
3 violation of the state consumer protection statutes listed below:

- 4 a. Defendants have engaged in unfair competition or unfair or deceptive acts or
5 practices in violation of Alaska Stat. § 45.50.471, *et seq.*;
- 6 b. Defendants have engaged in unfair competition or unfair or deceptive acts or
7 practices in violation of Ariz. Rev. Stat. § 44-1522, *et seq.*;
- 8 c. Defendants have engaged in unfair competition or unfair or deceptive acts or
9 practices in violation of Ark. Code § 4-88-101, *et seq.*;
- 10 d. Defendants have engaged in unfair competition or unfair or deceptive acts or
11 practices in violation of Colo. Rev. Stat. § 6-1-105, *et seq.*;
- 12 e. Defendants have engaged in unfair competition or unfair or deceptive acts or
13 practices in violation of Conn. Gen. Stat. § 2-1 10a, *et seq.*;
- 14 f. Defendants have engaged in unfair competition or unfair or deceptive acts or
15 practices in violation of 6 Del. Code §§ 2511, *et seq.* and 2531, *et seq.*;
- 16 g. Defendants have engaged in unfair competition or unfair or deceptive acts or
17 practices in violation of D.C. Code § 28-3901, *et seq.*;
- 18 h. Defendants have engaged in unfair competition or unfair or deceptive acts or
19 practices in violation of Fla. Stat. § 501.201, *et seq.*;
- 20 i. Defendants have engaged in unfair competition or unfair or deceptive acts or
21 practices in violation of Haw. Rev. Stat. § 480-1, *et seq.*;
- 22 j. Defendants have engaged in unfair competition or unfair or deceptive acts or
23 practices in violation of Idaho Code § 48-601, *et seq.*;
- 24 k. Defendants have engaged in unfair competition or unfair or deceptive acts or
25 practices in violation of 815 ILCS §505/1, *et seq.*;
- 26
27
28

1. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Kan. Stat. § 50-623, *et seq.*;
- m. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Ky. Rev. Stat. § 367.170, *et seq.*;
- n. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of La. Rev. Stat. § 51:1401, *et seq.*;
- o. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Md. Com. Law Code § 13-101, *et seq.*;
- p. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Mich. Comp. Laws Ann. § 445.90 1, *et seq.*;
- q. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Minn. Stat. §§ 325D.43, *et seq.*; 325 F.67, *et seq.*; and 325F.68 *et seq.*;
- r. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Vernon's Ann. Missouri Stat. § 407.010, *et seq.*;
- s. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of MT Code § 30-14-101 *et seq.*;
- t. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Neb. Rev. Stat. § 59-1601, *et seq.*;
- u. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Nev. Rev. Stat. Ann. § 598.0903, *et seq.*;
- v. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.H. Rev. Stat. § 358-A:1, *et seq.*;
- w. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of N.J. Rev. Stat. § 56:8-1, *et seq.*;

- 1 x. Defendants have engaged in unfair competition or unfair or deceptive acts or
2 practices in violation of N.M. Stat. § 57-12-1, *et seq.*;
- 3 y. Defendants have engaged in unfair competition or unfair or deceptive acts or
4 practices in violation of N.Y. Gen. Bus. Law §§ 349 *et seq.* and 350-e, *et seq.*;
- 5 z. Defendants have engaged in unfair competition or unfair or deceptive acts or
6 practices in violation of N.D. Cent. Code §§ 51-12-01, *et seq.*, and 51-15-01, *et*
7 *seq.*;
- 8 aa. Defendants have engaged in unfair competition or unfair or deceptive acts or
9 practices in violation of Okla. Stat. § 15 751, *et seq.*;
- 10 bb. Defendants have engaged in unfair competition or unfair or deceptive acts or
11 practices in violation of Or. Rev. Stat. § 6464.605, *et seq.*;
- 12 cc. Defendants have engaged in unfair competition or unfair or deceptive acts or
13 practices in violation of 73 Pa. Stat. § 201-1, *et seq.*;
- 14 dd. Defendants have engaged in unfair competition or unfair or deceptive acts or
15 practices in violation of R.I. Gen. Laws. § 6-13.1-1, *et seq.*;
- 16 ee. Defendants have engaged in unfair competition or unfair or deceptive acts or
17 practices in violation of S.C. Code Laws § 39-5-10, *et seq.*;
- 18 ff. Defendants have engaged in unfair competition or unfair or deceptive acts or
19 practices in violation of S.D. Codified Laws § 37-24-1, *et seq.*;
- 20 gg. Defendants have engaged in unfair competition or unfair or deceptive acts or
21 practices in violation of Tenn. Code Ann. § 47-18-101, *et seq.*;
- 22 hh. Defendants have engaged in unfair competition or unfair or deceptive acts or
23 practices in violation of Utah Code Ann. § 13-11-1, *et seq.*;
- 24 ii. Defendants have engaged in unfair competition or unfair or deceptive acts or
25 practices in violation of 9 Vt. § 2451, *et seq.*;
- 26
27
28

jj. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Va. Code § 59.1-196, *et seq.*;

kk. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Wash. Rev. Code. § 19.86.010, *et seq.*; and

ll. Defendants have engaged in unfair competition or unfair or deceptive acts or practices in violation of Wis. Stat. § 100.20, *et seq.*

143. Plaintiff and Class Members reasonably relied upon Defendants' misrepresentations and/or omissions in buying the Zicam Products.

144. Plaintiff will provide any required notice to appropriate entities regarding Defendants' unfair and deceptive trade practices.

145. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the Class are entitled to compensatory damages, treble damages, attorneys' fees and the costs of this suit.

COUNT VIII

Unjust Enrichment

(On behalf of Plaintiff individually and on behalf of the Classes)

146. Plaintiff repeats and realleges the allegations in paragraphs 1 through 74 as if fully set forth herein.

147. Plaintiff brings this claim individually and on behalf of all similarly situated Class Members.

148. By their wrongful acts and omissions described within this complaint, including the deceptive packaging, labeling, marketing, advertising, distribution, and sale of the Zicam Products as clinically proven to shorten colds, Defendants were unjustly enriched at the expense of Plaintiff and Class Members.

149. Plaintiff and Class Members' detriment and Defendants' enrichment were related to and flowed from the wrongful conduct challenged in this complaint.

1 150. Defendants have profited from their unlawful, unfair, misleading, and deceptive
2 practices at the expense of Plaintiff and Class Members under circumstances in which it would be
3 unjust for Defendants to be permitted to retain the benefit. It would be inequitable for Defendants
4 to retain the profits, benefits, and other compensation obtained from their wrongful conduct as
5 described herein in connection with the deceptive packaging, labeling, marketing, advertising,
6 distribution, and sale of the Zicam Products.
7

8 151. Plaintiff and Class Members have been damaged as a direct and proximate result
9 of Defendants' unjust enrichment because they would not have purchased the Zicam Products had
10 they known that the Products were not clinically proven to shorten colds.
11

12 152. Defendants knew and intended that Plaintiff and Class Members would make
13 payments for the Zicam Products based on the belief that the Products were clinically proven to
14 shorten colds, as represented by Defendants in advertising and marketing, on Defendants' website,
15 and on the labels and packaging. It is inequitable for Defendants to retain the benefit of payments
16 obtained through false and misleading representations.
17

18 153. Plaintiff and Class Members are entitled to recover from Defendants all amounts
19 wrongfully collected and improperly retained by Defendants.
20

21 154. When required, Plaintiff and Class Members are in privity with Defendants because
22 Defendants' sale of the Zicam Products was through authorized sellers. Purchase through
23 authorized sellers is sufficient to create such privity because such authorized sellers are Defendants'
24 agents for the purpose of the sale of the Zicam Products.
25

26 155. As a direct and proximate result of Defendants' wrongful conduct and unjust
27 enrichment, Plaintiff and Class Members are entitled to restitution of, disgorgement of, and/or
28 imposition of a constructive trust upon all profits, benefits, and other compensation obtained by
Defendants for their inequitable and unlawful conduct.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all other similarly situated Class Members, prays for relief and judgment, including entry of an order:

- A. Declaring that this action is properly maintained as a class action, certifying the proposed Class, appointing Plaintiff as Class Representative and appointing Plaintiff's counsel as Class Counsel;
- B. Directing that Defendants bear the costs of any notice sent to the Class;
- C. Awarding Plaintiff and Class Members actual damages, restitution and/or disgorgement;
- D. Awarding Plaintiff and Class Members statutory damages, as provided by the applicable state consumer protection statutes invoked above;
- E. Enjoining Defendants from continuing to engage in the unlawful and unfair business acts and practices as alleged herein;
- F. Awarding Plaintiff and Class Members restitution of the funds that unjustly enriched Defendants at the expense of Plaintiff and Class Members;
- G. Awarding Plaintiff and Class Members pre- and post-judgment interest;
- H. Awarding attorneys' fees and litigation costs to Plaintiff and Class Members; and
- I. Ordering such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury of all claims in this complaint so triable.

1 Dated: April 9, 2021

Respectfully submitted,

2 **GREG COLEMAN LAW PC**

3 /s/ Alex R. Straus

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